IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1673

LEROY W. SUGG,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF
ILLINOIS, FIRST DISTRICT

Stanley Block
Phil Lieb
Mel Cahan
Robin Auld

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Attorneys for Petitioner

ORAL ARGUMENT REQUESTED

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PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF
ILLINOIS, FIRST DISTRICT

Petitioner, LEROY W. SUGG, respectfully prays for a writ of certiorari to issue to review the judgment of the Supreme Court to the State of Illinois denying leave to appeal from the Illinois Appellate Court's First District, affirmance of petitioner's conviction. Judgment was entered on January 23, 1976.

Opinions Below

No opinion of the Illinois Appellate Court was written. An "Order Disposing of Appeal from under Supreme Court Rule 23" was entered in case number 60057 on Cotober 6, 1975.

The Illinois Supreme Court issued no opinion in denying leave to appeal. Its notification of judgment is dated January 23, 1976.

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. S 1257(3). The judgment of the Supreme Court of Illinois was entered on January 23, 1976.

Question Presented

I. Did Illinois deny petitioner a "Fair Trial" when before trial it seized evidence probably favorable to the defense upon the promise that scientific tests would be preformed and then failed to perform these tests and contaminated the evidence so that subsequent testing would be meaningless?

Constitutional Provision Involved

The due process clause of the Fourteenth Amendment to the Constitution of the United States:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law..."

Statement of the Case

Petitioner was convicted of involuntary manslaughter on September 17, 1973, after a bench trial in the Circuit Court of Cook County, Illinois. On October 6, 1975, by written order, the Illinois Appellate Court simmarily dismissed his appeal on the merits after increasing the sentence. On January 23, 1976, the Illinois Supreme Court refused discretionary Leave to Appeal, after reducing the sentence to that imposed by the Trial Court. Petitioner was accused of having murdered his upstairs' neighbor on February 10, 1973, by beating him about the head with a baseball bat and a gun while the victim and other occupants of the victim's

apartment were held at gun point.

Supposedly, the killing grew out of a dispute over ringing petitioner's doorbell. At trial, petitioner admitted he was annoyed over the doorbell incident and had gone to the victim's apartment to complain but denied possession of a gun or other weapon, denied having seen or touched a baseball bat and denies that any beating whatsoever occurred while he was present in the victim's apartment.

The State called various people who claimed to be present in the victim's apartment at the time of the fatal beating, including the victim's roommate, James Savino. Generally, these witnesses claimed petitioner and his roommate entered the victim's apartment armed with a pistol, knives and a baseball bat to complain about the ringing of their doorbell. While the other persons in the apartment were held at gunpoint, the victim was beaten to death with a baseball bat and later, a pistol, which beating took more than 20 minutes. Savino testified he never touched the baseball bat and that after the beating it was left in his apartment.

Subsequently, petitioner was arrested and held in custody until his preliminary hearing. At this hearing, Savino under adverse examination by the defense, was confronted with the blood-stained baseball bat found by Savino's landlady hidden in a hollow table leg in Savino's apartment.

At the preliminary hearing, the State attempted to seize and impound the weapon, produced by the defense attorney. Ultimately, petitioner's attorney agreed to having the weapon impounded by the State upon the express promise that it would be analyzed for fingerprints.

Later, the defense filed its standard discovery motion seeking, inter alia, physical evidence and scientific or expert reports. The State's response was silent as to the existence of the baseball bat or the results of any analysis.

In any event, upon the day the State's discovery response was filed, the defendant moved to dismiss the prosecution upon the ground that the State had failed to keep its promise and submit the weapon for scientific examination. This motion was denied.

Thereafter, the prosecution was called for trial six times during the succeeding five months and, each time, the state sought and obtained a continuance over petitioner's objections. Finally on September 12, 1973, the State answered, "Ready for trial." Prior to the commencement of trial, petitioner renewed his motion to dismiss the prosecution grounded upon the State's breach of its promise to investigate the baseball bat for the existence of scientific or circumstantial evidence to corroborate petitioner's plea of innocent. During the hearing upon petitioner's motion, the prosecutor represented to the Court that "fingerprints were not a feasible thing to expect from the exhibit the [baseball bat"] at that time. The motion was denied and the trial commenced.

Petitoner was found guilty of involuntary manslaughter.

Reasons for Granting Certiorari

Petitioner was denied a constitutionally fair trial when the State seized a baseball bat which was identified as the murder weapon and, contrary to their express promise in open court, failed to analyze it for fingerprints and contaminated its value as evidence favorable to the defense.

Petitioner was arrested and held in custody to answer a homicide charge growing out of the fatal beating of his upstairs neighbor with a baseball bat. While petitioner was in police custody, the victim's landlady found a bat hidden in the apartment shared by the victim and the State's chief witness, James Savino. During adverse examination by the defense at the preliminary hearing, Savino testified that the killer used the baseball bat in committing the crime, that he had never touched this weapon that he had no explanation for it being found hidden in his apartment.

Thereupon, the State sought to impound the weapon and seize it from the defense attorney. Before the Court could rule on the State's request, the defense permitted the weapon to be impounded by the State upon the express promise made in open court that the State would analyze it for fingerprints. Under the instant circumstances, Illinois has lost the right to prosecute because a fair trial could not be had after evidence favorable to the accused was contaminated and destroyed by the State—made unavailable after the State's express undertaking to disclose and its implied obligation to preserve. Accordingly, petitioner's Fourteenth Amendment rights have been denied.

As this Honorable Court stated in Brady v. Maryland 373 US 83, 83 S.Ct 1194 (1963):

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material... irrespective of the good faith or bad faith of the prosecution." 373 US at 87."

Commenting on Bradynine years later, this Court in Moore v. Illinois, 408 US 786, 92S.Ct. 2562 (1972), stated:

> "The heart of the holding in Brady is the prosecution's suppression of evidence in the face of a defense production request, where the evidence is favorable to the accused and is material to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence is favorable character for the defense, and (c) the materiality of the evidence." 408 US at 795.

The record demonstrates beyond cavil that the three requirements of Moore were met, and made known to the trial court in defendant's seasonable "Petition to Dismiss." (See Appendix.) The bat was given to the State in return for its promise to analyze. The evidence was not inventoried as is shown by the State's response to discovery. In addition, establishing that no one had touched the handle of the baseball bat during this 5-month period was impossible in view of the State's inability to account for the handling of the evidence. By the time the trial was to commence some five months later an analysis would not have been probative.

The materiality of the baseball was entablished, a fortiori, at the time of the preliminary hearing, the transcript of which was received into evidence at the trial.

Likewise, the character of the evidence as being favorable to the defense was established. The bat was shown to have been purposefully secreted in the victim's apartment, premises not accessible to petitioner. The absence of petitioner's prints on the bat would have corroborated his testimony that he never touched it. The absence of any fingerprints on the weapon, i.e., that it was wiped clean, would have strongly implied a conscious effort on someone's part, probably Savino,

to protect the real culprit; certainly, someone had previously held the bat handle. Even smudge prints might have ruled out petitioner or inculpated another.

In any event, the record is clear that the prosecutor promised to have a fingerprint analysis made and did not heed his words. Whatever answers which the bat handle might have held in latent form are now wholly and completely unavailable.

Whether the State acted in good faith or bad, the fact of the matter is that because of State action and a breach of State's promise, the evidence no longer exists. It is important to note that the evidence about which the petitioner complains did exist and was known to exist at the time the prosecution took possession of the exhibit.

Clearly, this situation differs substantially from that where a team of investigators come upon a crime scene and inadvertently fail to discover evidence favorable to the defense. Here, the State took possession of evidence previously shown to possibly favor the defense in the hope that their scientists and criminologists could find an explanation consistent with its theory that the petitioner was the perpetrator of the homicide.

Under the Illinois civil law failure of a party to produce physical evidence within his control creates as a matter of law a presumption that evidence if produced, would have been adverse to him, e.g., Berry v. Breed, 311 Illinois App. 469, 474-478, 36 N.E. 2d 591 (1941): See, Illinois Pattern Jury Instructions, Civil, IPI 2d S5.01. In Illinois criminal practice, though not elevated to the stature of a legal presumption, the logical interference exists and may be argued to the fact finder.

Similarly, this Court should indulge in such a presumption where an accused's constitutionally guaranty had rights are at stake. As noted in the dissent in Moore v. Illinois, 408 US 786, 92 S.Ct. 2562:

> "Obviously, some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting in bringing an accused to justice. But, this burden is the essence of due process of law. It is the State that tries a man and it is the State that must be sure that the trial is fair." 408 US at 810.

Literally, criminal prosecutions are brought in the name of the people of the sovereign state against an accused. The "prosecution team" includes police investigators, crime laboratories and a full staff of attorneys. If all the people can advantage themselves at substantial cost to the taxpayers, then our Constitution guarantees to one accused the right to have the State supported crime investigators conduct and even-handed search for the truth and upon proper application have the results of the adversary nature of our system, exculpatory facts must be disclosed. The prosecution and defense are adverse in the contest to persuade, but allies in the search for truth.

To require proof that what was arbitrarily taken from the defense would have made the defense successful is to reward the culpable party. Once the substantial probability that an accused was denied his constitutionally guaranteed rights is established, then, the burden shifts to the State to persuade the trial court that the challenged State action is not un-constitutional, Jackson v. Denno, 378 US 368, 84 S.Ct. 1774 even if only

by a preponderance of the evidence, Lego v. Toomey, 404 US 477, 92 S.Ct. 619. Here, petitioner made a prima facie showing that a Brady violation of his constitutional rights had occured when he called the Court's attention the the State's shortcoming with petition to dismiss, filed the same day he received the State's insufficient answer to discovery. Five months later, petitioner proceeded to trial only after renewing his objection, and stating he did not waive his rights, vis a vis the impounded murder weapon. The only method by which the State avoided the thrust of this contention was to informally represent hearsay rumor to the Court some five months later that "fingerprints were not a feasible thing the expect from that exhibit.", at this time the contrary representation was made to the Court, expressly or impliedly, at the preliminary hearing. During this 5-month period, no analysis was made and the evidentiary chain of possession was broken. Notwithstanding the States's affirmative burden to demonstrate that the prosecution was fair, it made no attempt to show why its promise was not kept and why petitioner's evidence was effectively taken from him and contaminated before it could be used at trial.

For this reason, the trial court erred and petitioner was denied due process of law.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Appllate Court of Illinois, First District,

Respectfully submitted,

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Attorneys for Petitioner

January 23, 1976

Mr. Phillip S. Lieb
Attorney at Law
105 W. Adams Street
Suite 220
Chicago, Illinois 60603

In re: People State of Illinois, respondent,
vs. LeRoy W. Sugg, etc., retitioner.
No. 48063

Dear Mr. Lieb:

The Supreme Court today made the following announcement concerning the above entitled cause:

The petition for leave to appeal is denied. It appears from the record that petitioner was sentenced to a term of 1 to 6 years. The appellate court, under the impression that the sentence was for a term of 5 to 6 years modified the exercise of this Court's supervisory jurisdiction that portion of the appellate court judgment modifying the sentence of 1 to 6 years is reinstated.

A certified copy of this order will be issued to the Clerk of the Circuit Court of Cook County, Criminal Division, and the Clerk of the Appellate Court, First District.

Very truly yours,

Clerk of the Supreme Court

CLW:jae
cc: Leroy W. Sugg
Bernanrd Carey
Wm. J. Scott

APPELLATE COURT OPINION

60057

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appelle, vs. LEROY W. SUGG, also known as LEROY H. SANITORA, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HON. LOUIS B. GARIPPO Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant was indicted for murder. After a bench trial he was found guilty of involuntary maslaughter and sentenced from 5 to 6 years. The evidence showed that the defendant and his roommate entered another apartment of the building in which they lived to protest alleged annoyance from their neighbors. There is evidence that the defendant was armed with a gun and that a baseball bat was subsequently found under a table in the invaded apartment. A scientific examination showed human blood at the end of the bat but the type could not be ascertained. There was no examination for fingerprints.

As a result of the incident, one of the occupants of the invaded apartment died of a skull fracture after being taken to the hospital. There is testimony by one witness that the defendant repeatedly struck the deceased in the head with the butt of his gun. There is also conflicting testimony by another witness that he did not see the defendant strike the deceased with the gun or bat. According to police testimony, defendant admitted that he had beaten someone in the other apartment.

Defendant makes two contentions:

1. He was convicted of a crime for which he was not indicted and which was not proved by the evidnece. It was the function of the trial court to weigh the credibility of the witnesses to determine if defendant was guilty of murder or the included offense of involuntary manslaughter or was not guilty. There is amply evidence in the record to support the finding of guilt of involuntary manslaughter. Striking the deceased with a pistol could constitute reckless action under the statue. (People v. Taylor, 54 Ill. 2d 558, 301 N.E. 2d 273.) Since the evidence could also possibly support a finding of guilty of murder, defendant is in no position to complain.

2. The State confiscated the baseball bat and destroyed its usefulness to defendant. We do not find confiscation here. The trial judge assisted both sides in determining the results of scientific examination. The bat was produced and used be defendant's counsel as an exhibit and during examination of witnesses. At trial defendant's attorney did not question the exhibit was not feasible.

An opinion here would have no precedential value and no substantial question is presented by this appeal.

Involuntary manslaughter is a Class 3 felony. (Illinois Rev. Stat. 1973, ch. 38, par.9-3.) The minumum may not exceed one third of the maximum term to 2 years. The judgment appealed from is as modified.

Dated at Chicago, Illinois, this 6th day of October, 1975.

Enter:

Joseph Burke, Presiding Justice

Mayer Goldberg, Justice

Edward J. Egan, Justice

Petition to Quash Indictment and Dismiss Defendant filed April 30, 1973, as follows:

PETITION TO QUASH INDICTMENT AND DISMISS DEFENDANT

NOW COMES the Defendant, LEROY SUGG, by and through his attorney PHILIP S. LIEB and in support of his motion for dismissal states as follows:

1. That on March 19th, 1973 the Defendant had a Preliminary Hearing before the Honorable Judge Maurice D. Pompey. Present at that hearing, under subpoena of the State's Attorneys Office, were witnesses James Savino and Veronnica Zawojski.

2. That the Assistant State's Attorney at that hearing was advised both on and off the record, that it was the position of the Defendant that he was innocent of the charges and further, that the evidence appeared to indicate that the murder was committed by one of the State witnesses and most probably James Savino.

3. That during the course of the Preliminary hearing, the State's Attorneys Office failed to call James Savino.

4. That James Savino was called as a witnesses by the defense over the very strenuous objections of the State's Attorneys Office, and during the course of direct examination by the defense James Savino admitted that a club, marked and identified, and presented to James Savino for his inspection by the defense, was infact the murder weapon. The State's Attorneys Office was advised both before and after this examination of James Savino that the murder weapon was recovered from the possession of James Savino.

5. That the identified murder weapon was delivered by the defense in open Court to the State's Attorneys Office and a demandment. The Assistant States Attorney then gave the murder weapon to Officer Richard Laletski for the purpose of having the crime lab analyze the club.

6. That on the day of the Preliminary Hearing, and immediately subsequent to that hearing, defense counsel, in the presence of that Officer and other Court personnel, was advised by James Savino and other friends of his, that he was to be killed and that they were planning to club defense counsel to death in the same manner in which the deceased in the case was killed. Because of the threat in the presence of witnesses, the State's Attorneys Office gave defense counsel police escort from the building and to his automobile, and followed defense counsel for a period of time to be certain that there were no vehicles following defense counsel.

7. The State's Attorneys Office, having been thoroughly advised as to where the murder weapon was recovered and the surronding circumstances, and being further advised of the position of the defense in its belief that the evidence appears to point an accusing finger at the State's Star Witnesses, and having in its possession the identified murder weapon, declined to present such evidence to the Grand Jury that indicted the Defendant herein, and concealed from that Grand Jury the murder weapon.

8. That in answer to the Discovery Motion filed by the Defendant, the State's Attorneys office has failed to include as physical evidence the identified murder weapon, surrendered to their office by defense counsel.

9. That the deliberate and calculated course followed by the State's Attorneys Office has deprived the Defendant of due process of law, and has severely and irreparably damaged the Defendants opportunity of presenting a defense and has further withheld information from the Grand Jury which if otherwise was known to them, could have resulted in a No Bill. All in violation of the State and Federal Constitutions and of the spirit and letter of Illinois Revised Statutes, Chapter 38, for such cases made and provided.

WHEREFORE, Defendant demands that an Order be entered discharging the Defendant under the above indictment

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LIEB & ROTCHE
100 No. LaSalle
Chicago, Illinois
726-9519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1673

LEROY W. SUGG,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois

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CITATIONS

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(On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the Illinois Appellate Court properly applied the standard of prosecutorial duty in submitting evidence to defense counsel in this case.

STATEMENT OF FACTS

On February 10, 1973, Joseph Hauser and his girlfriend, Veronica Cajowski were in his apartment with his roommate James Savino, when someone knocked on the door. (R. 16-17, 124-125) Hauser left the bedroom to answer the door. (R. 125) Savino, who was in the bathroom and Miss Cajowski, who remained in the bedroom, heard a loud commotion in the front room. Miss Cajowski went to the front room where she saw the defendant Leroy Sugg holding a gun and saw Steven Bataglio beating Hauser. (R. 126-127) Savino stepped into the hallway but was ordered at gunpoint by Bataglio to return to the bathroom. (R. 20-22) Savino attempted to leave the bathroom a second time and was shot at by Bataglio. (R. 22-24) Fifteen or twenty minutes after Sugg and Bataglio arrived, the apartment bell rang. It was located at the rear of the apartment and could not easily be heard in the front room. Miss Cajowski pressed the buzzer to admit the person. (R. 25, 128-130) Savino again left the bathroom and saw that his friend, Ronald Talerico, had arrived. He also saw Hauser sitting on the floor, bleeding from the head and face. (R. 24-26) Sugg and Bataglio dragged Hauser across the floor and Hauser was struck on the head by Sugg with the butt of a gun. After the beating Hauser did not move. (R. 26-27) Bataglio took Talerico to the bedroom. He noticed that there was a telephone in the bedroom, accused Miss Cajowski of phoning the police and took her with them as a hostage. (R. 27-29, 130) On her way out of the apartment she saw that the living room was in a shambles and Hauser was bleeding. (R. 131-132)

Sugg and Bataglio lived in an apartment on the first floor of the building and apparently their hostility stem-

med from the fact that Hauser's and Savino's visitors often rang the defendant's bell for admittance to the apartment building. (R. 36-38) Sugg brought Miss Cajowski to his apartment and called Bataglio, still in Hauser's apartment, at two, fifteen minute intervals to see if the police had arrived. (R. 30, 134, 135) Sugg and Miss Cajowski then went back upstairs. (R. 31)

According to Miss Cajowski, something appeared to aggravate Bataglio who picked up a bat and shattered the picture tube of the television. (R. 136) This was the only time Miss Cajowski saw a bat in the victim's apartment. (R. 132, 136, 164) Although Savino's testimony indicated that the defendant may have had the same bat during the beating, Savino did not personally observe either the defendant or Bataglio use this weapon to strike the victim. (R. 39-40, 45, 50-51, 75, 81-83, 111-112) He said that the bat was not in his apartment before the defendant and Bataglio entered about 10:00 p.m. and that they left it on the living room floor. (R. 83-86) He did not know what subsequently happened to the bat because he moved out of his apartment the next day, and took only a few items of clothing with him. (R. 88, 91)

Before Bataglio and Sugg left the apartment, they told Savino that he should fabricate a story to explain Hauser's injuries or Miss Cajowski would be hurt. (R. 31, 136-137, 140) Miss Cajowski, Savino, and Talerico helped Hauser into Talerico's car and took him to a hospital. (R. 32, 137) Savino did not appreciate the seriousness of Hauser's injuries, and told the hospital personnel that Hauser had been beaten by a group of Puerto Ricans. (R. 32-34) After he discovered that Hauser was in critical condition and was dying, he went to the police and related what actually

transpired on February 10, 1973. (R. 33-35, 87-88) The police then called on Miss Cajowski who, having learned of Hauser's grave condition, informed them of the events on February 10, 1973. (R. 137-140) She had not contacted them earlier because she expected Hauser to recover and handle the problem himself. (R. 139) She also feared reprisals by the defendant and Bataglio since the defendant knew her parents' address. (R. 139) Hauser died on February 18, 1973. (R. C120)

Shortly after midnight on February 11, 1973, Officer Paul of the Chicago Police Department talked to hospital personnel who had treated Hauser and learned that Savino had told them that Hauser was beaten and robbed by three male Puerto Ricans. Officer Paul who was wearing civilian clothes and two other officers, also in civilian clothes went to Savino's apartment. (R. 170-171, 176-178) While they were on the first floor of the apartment building Sugg and Bataglio came out of their apartment wearing bloodstained shirts and pants. (R. 172-173, 178, 186)

Thinking that the defendant and Bataglio had been injured in an incident unrelated to his investigation, Officer Paul, who had not revealed his identity, asked if they were all right. (R. 173-175) The defendant said, "We're all right. But we beat the shit out of the guy upstairs." (R. 174-75) Bataglio then interjected, "Yeah, we got him. He keeps ringing our door bell." (R. 175) And the defendant added, "Yeah, the jackoff is always ringing our door bell." (R. 175)

The morning following the beating Savino moved out of the building, taking only a few items of clothing with him. (R. 88-91) A few days later the landlady, Mrs. Sato, went to the apartment to change the locks. (R. 198) Mr.

Sato removed a set of encyclopedias, three expensive leather coats and some furniture from the apartment after Hauser's death. (R. 223) Mrs. Sato returned to the apartment near the end of the month to clean. She testified that she found a club or bat under a cocktail table and turned it over to defense counsel who marked it as defendant's exhibit #4 for identification. (R. 205, 207)

The defendant testified that he made no admission of beating the victim to the police officers. This story was corroborated by Mr. Sato who admitted on cross examination that Hauser owed him about $400. (R. 250, 218-222) The defendant also said that he didn't know anything about a club. (R. 267)

At the preliminary hearing on March 19, 1973, defense counsel turned over an exhibit, a club, to the State for purposes of analysis. (R. C103, 111-112) Although the club had not been analyzed by the time the trial started, it was subjected to micro-analysis during the trial. In a conference call on September 12, 1973, Sergeant Louis Vitullo of the Microanalysis Section of the Chicago Police Department's Criminalistics Division informed the trial judge and defense counsel that an examination of the club revealed a reddish substance of one end of the club which proved to be human blood. The blood could not be typed. Sergeant Vitullo further informed them that the club had not been examined for fingerprints. (R. 10) Before this call was made the prosecutor, Mr. Schaffner, advised the court that he had inquired about the club and learned that "fingerprints were not a feasible thing to expect from that exhibit." (R. 7) The club was returned to defense counsel in time for identification by a defense witness, Sarah Sato. (R. 205)

REASON FOR DENYING THE WRIT

The Illinois Appellate Court Properly Applied The Standard Of Prosecutorial Duty In Submitting Evidence To Defense Counsel In This Case Where The People Did Not Obtain Fingerprint Analysis Of Extraneous Evidence Which Was Temporarily Within Their Possession Between The Preliminary Hearing And Trial But Was In The Possession Of The Defendant At All Other Times.

In 1963, this Court prescribed the duty of a prosecutor regarding the submission of evidence within his possession to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). That case held that:

> ". . . [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."
>
> *Brady* v. *Maryland, supra* at p. 87

These guidelines were discussed further by this Court in *Moore* v. *Illinois*, 408 U.S. 786 (1972):

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." 408 U.S. 784-785

The alleged abuse in this case, the failure to analyze the bat for fingerprints, does not even pass the threshhold question in determining a violation of the *Brady* standard—that there has been a suppression by the prosecution. The

bat was found by the landlady of the building in which the fight occurred. She turned it over to *defense counsel*, who had it until the preliminary hearing. At the preliminary hearing defense counsel said he would give the bat to the prosecutor to determine who the owner was. The prosecutor indicated he would investigate it and submit it to analysis. The judge and counsel were informed of the microanalysis results by the crime lab technician and were told that fingerprints should not be expected from the exhibit. Defense counsel made no objection to the lack of a fingerprint test and at no time made a request for a continuance to have the bat independently analyzed. The bat was returned to defense counsel for his use at trial.

This situation certainly does not constitute "suppression" of evidence by the prosecutor within the proscription of *Brady*. The language of that case is clear in its import and courts have consistently construed it to mean that a prosecutor is not required to turn over evidence to the defense that is either available to the defense or does not exist. *United States* v. *Romano*, 482 F.2d 1183 (5th Cir. 1973); *Escobedo* v. *United States*, 350 F.Supp. 894 (Aff'd. 489 F. 2d 758 (7th Cir. 1973); *United States* v. *Akin*, 464 F.2d 7 (8th Cir. 1972); *Brown* v. *Crouse*, 425 F.2d 305 (10th Cir. 1970); *United States* v. *Mackin*, 502 F.2d 429 (D.C. Cir. 1974).

Further, any claim that the prosecution "contaminated" the bat is unfounded. The bat was found several days after the incident; was handled, at least, by the landlady, defense counsel, and by Savino in court (R. C103) Given this uncertain path which eventually led to the crime lab, it is unreasonable to presume that the prosecutor is responsible for some alleged contamination.

CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

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• KAREN S. THOMPSON, a recent graduate of DePaul University, College of Law, assisted in the research and preparation of this Brief.